(27)

IN THE

Supreme Court of the United States

October Term, 1945

INDIANAPOLIS GLOVE COMPANY,
a Corporation,
Petitioner,
v.
CHESTER BOWLES, *Administrator,*
Office of Price Administration,
Respondent.

No. 617

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Indianapolis Glove Company, a corporation, respectfully petitioning, shows the Court:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED.

A. NATURE OF THE ACTION AND DECREES BELOW.

This suit was commenced by the predecessor in office of the present respondent, who was substituted subsequent

to his assumption of office (R. 20, 21), against petitioner Glove Company seeking to recover treble damages for sales at allegedly over ceiling prices for a one-year period commencing October 6, 1942 (R. 2, 3).

Trial was had by the Court without the intervention of a jury. The trial court made special findings of fact (R. 137-182) and stated thereon its conclusion of law that the law was with the petitioner and that respondent take nothing either by way of damages or penalty [1] (R. 182).

Judgment was entered for petitioner. (R. 182.) Respondent appealed to the Circuit Court of Appeals for the Seventh Circuit. (R. 183.) The cause was reversed and remanded (R. 203).

The opinion of the Court (R. 194-202) held:

(a) The decision in the case of *Bowles v. Seminole Rock and Sand Co.* (decided June 4, 1945, 89 L. Ed. Adv. Op. 1186) conclusively established the rule of law against petitioner's contention [2] as to its maximum prices for its work gloves (R. 197, 201).

(b) The good faith of petitioner (which was stipulated) was not an available defense to it (R. 198-199).

(c) The conduct of his representatives had not estopped respondent from recovery for the period of time petitioner was induced by such conduct to renew its deliv-

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[1] Pursuant to joint request of parties, the trial court reserved the issue of measure of damages. (R. 19.)

[2] As hereafter pointed out more fully, some of the pertinent facts in the instant case vary widely from those in the Seminole case. This Court also had before it in the Seminole case only Maximum Price Regulation 188, the language of which varies from that of General Maximum Price Regulation and Amendments 23 and 38, involved here.

eries at prices now claimed by respondent to be over-ceiling (R. 200, 201).

(d) Petitioner was not denied an opportunity to contest the validity of the applicable price regulation as construed by respondent in violation of petitioner's rights under the Fifth Amendment to the Constitution of the United States (R. 200).

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended. (28 USCA 347 (a), C 426, 48 Stat. 926.)

The opinion of the Circuit Court of Appeals was filed on August 3, 1945 (R. 194). On August 18, 1945, within the time permitted, petitioner's petition for rehearing was filed (R. 203) and was denied on August 28, 1945, without opinion (R. 223) and decree thereafter entered (R. 223).

This petition was filed before the expiration of three months from August 28, 1945.

III.

STATEMENT OF THE FACTS.

A substantial portion of the facts was stipulated. The stipulation was adopted as part of the Court's special findings of fact. (R. 137-178.) Facts were also found in addition to those stipulated. (R. 178-182.)

Petitioner is engaged in the manufacture and sale of work gloves. Its sales in the main are to wholesalers, jobbers and, in certain cases, to chain stores and industrial plants. (Stip. [3] II, R. 137, 138; offered R. 24; R. 93.) It has but one price to all of its purchasers for all orders placed with it for the same item or model during any particular period of time. with the exception of incidental sales in broken lots. (Stip. XXVI, R. 150.)

On December 8, 1941, petitioner changed and made effective a basic price list for its work gloves. (Stip. IX, R. 145.)

On March 21, 1942, approximately two months before the promulgation of the General Maximum Price Regulation, petitioner adopted and made effective a new basic price list (Stip. Ex. B, R. 145, 159), which made a uniform and general increase in the prices of all the items or models of petitioner's work gloves.

This increase was made necessary because of increased costs of material and labor entering into the manufacture of petitioner's products. (Finding No. 3, R. 178; R. 93, 94.)

On March 21, 1942, petitioner had valid and binding contracts with approximately 800 of its customers (on which there were approximately $1,000,000 worth of gloves still undelivered) at its December 8, 1941, and prior prices, due to the practice in the glove business of contracting for delivery many months in the future. (R. 93, 94.) Petitioner on and after March 21, 1942, sold and delivered during the month of March, 1942, many of its work gloves at the prices set forth in its new basic price list of March 21, 1942. (Stip. XXII, R. 149; Stip. XXXV, R. 150; R. 103, 104, 105.) After

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[3] Stip.—Stipulation of Parties.

March 21, 1942, it continued to deliver certain of its work gloves at prices lower than those fixed in the basic price list of March 21, 1942, solely because it was obligated to do so on account of such prior commitments. (Finding No. 2, R. 178; R. 91, 94.)

Certain of petitioner's models of gloves were not delivered during March, 1942, at any price.

On April 28, 1942, respondent's predecessor issued General Maximum Price Regulation, effective May 11, 1942. (Sec. 1499.23 GMPR; 7 Fed. Reg. 3156.) It was subsequently amended, including Amendment 23, August 20 and Amendment 38, December 4, 1942. This Regulation did not in and of itself fix a schedule or list of specific dollar and cents maximum prices. It was therefore incumbent upon petitioner in the first instance to ascertain at what dollar and cent prices its work gloves could be offered, sold and/or delivered. (Stip. VIII, R. 145.)

All sales of gloves made by petitioner since March 21, 1942, have been made at the following prices:

(a) For gloves listed on the basic price list of March 21, 1942, the prices on that basic price list; and

(b) For other gloves not specifically appearing on that basic price list, at prices determined by applying to the prices on the basic list trade differentials, well-known and established in the trade for more than 25 years, based on the size, weight and style of work gloves. (Finding No. 1, R. 178; Stip. XX, XXI, R. 149.)

Petitioner in the sale and delivery of its work gloves at all times here involved acted in entire good faith and in the

belief that its sales and deliveries of work gloves were made in pursuance of the applicable regulations of the Office of Price Administration. (Finding No. 12, R. 181; Stip. XIV, R. 147; R. 99, 102.)

In January, 1943, a representative of the O.P.A. made an investigation of petitioner for the purpose of determining whether petitioner had violated the regulations of O.P.A., and at the conclusion of the investigation advised officers of petitioner that in his opinion petitioner was complying with such regulations. (Finding No. 8, R. 179, 180; R. 108-114.)

No claim was ever asserted by respondent or his predecessors in office, or by the O.P.A., that petitioner was violating the maximum price regulation until March 2, 1943. (Stip. XVIII, R. 147; R. 96.)

After petitioner received the letter dated March 2, 1943, and on March 4, 1943, it stopped shipments of its gloves (R. 96, 97) and entered into discussions with representatives of the O.P.A. in which petitioner insisted that the proper interpretation of the General Maximum Price Regulation permitted and authorized it to sell all of its items or models of gloves appearing upon its basic price list of March 21, 1942, at the prices therein set forth or for any glove not appearing thereon at prices determined by the application thereto of well-known and established trade differentials based on the size, weight and style of said gloves. (R. 97.)

When the representatives of the local office of the O.P.A. were advised of petitioner's contentions, they presented the question to the Cleveland office of O.P.A. by a telephone call in the presence of petitioner's officers and told these officers

that the Cleveland office would take the matter up with the Washington office. (R. 97.)

Thereafter, on March 18, 1943, the local office of O.P.A., with the knowledge, consent and approval of the Cleveland and petitioner believes the Washington offices (R. 164, para. 6) of the Office of Price Administration, wrote a letter to petitioner in which it stated, among other things:

> "It has been the understanding and position of your Company that your March 21st List Prices were your maximum prices under the General Maximum Price Regulation and from the 21st of March, 1942, up until March, 1943, all sales and deliveries have been made on the basis of this list except those in fulfillment of orders ante-dating March 21st, 1942.
>
> * * * * *
>
> "We have sought but not yet obtained a clarification of your position from the Regional and National Offices. We have been advised, however, that information is being assembled by the National Office for use in preparation of a specific regulation establishing maximum prices for work gloves applicable to the entire industry. Believing that the present situation constitutes a serious impediment to the production of goods and materials essential to the prosecution of the war, we see no alternative other than to advise you to proceed with shipments on the basis of your March 21, 1942, list prices pending a definite ruling and decision by the Cleveland or Washington Offices. It is understood that this does not legalize or validate the prices charged from May 11, 1942, the date the General Maximum Price Regulation became effective, up to the present time." (Stip. XI, R. 145, 146; Finding 8, R. 179-180.)

After receipt of the above letter petitioner resumed the

sale and delivery of its gloves at the prices fixed in its basic price list of March 21, 1942, and the differentials hereinbefore referred to in the good faith belief that it had the right to do so under the applicable regulations and relying on the representations and permissions contained in said letter. (Finding No. 9, R. 180; Stip. XIV, R. 147; R. 98.)

The Office of Price Administration, with full knowledge of the belief and contentions of petitioner that it had a right to sell its work gloves at the prices established in its basic price list of March 21, 1942, or by the application of the differentials hereinbefore referred to, and with full knowledge that the letter of March 18, 1943, was outstanding, never advised or stated to petitioner in any way between March 18, 1943, and August 28, 1943, that its position was wrong or the letter incorrect. (R. 98.)

On August 28, 1943, petitioner received another letter from the Indianapolis office of O.P.A. attempting to withdraw for the future its said letter of March 18, 1943, and the permission therein contained (Stip. Ex. C, R. 163-170; offered R. 24), and thereupon petitioner immediately ceased to sell or deliver any controversial item or model of gloves and has not, since August 28, 1943, to the date of the commencement of this action below, sold or delivered any item, number or model of glove at prices which under the contentions of the O.P.A. would not be a correct ceiling price. (Finding No. 10, R. 180, 181; R. 98.)

If respondent's contenions are well taken petitioner could sell approximately one-half of its models of gloves at its March 21, 1942, basic prices and approximately one-half of its models of gloves at the earlier and superseded prices of December 8, 1941, and earlier price lists. The result from a business standpoint would be that petitioner

would be unable to sell any of its models of gloves at the March 21, 1942, basic price list, and the prices which petitioner could charge commercially for all of its gloves would be "rolled back" to the price level of December, 1941, and earlier. (R. 90, 91; Finding No. 4, R. 179.)

In March, 1942, petitioner had more than 500 items, numbers or models of work gloves in its line, and it was not commercially possible for it to sell and deliver either at the old or new prices all or a majority of such items, numbers or models during the month of March, 1942 (Finding No. 5, R. 179), because of the large number of models offered by petitioner and the practice in the glove business of entering into contracts for future delivery. (Stip. Ex. B, R. 159; XXII, R. 149; XXIII, XXIV, XXV, R. 150; R. 93.)

Recovery of *treble damages* is sought (R. 2, 6, 12, Stip. I, R. 137) for certain sales made by petitioner from October 6, 1942, to October 6, 1943. (R. 2.)

None of the sales in respect of which respondent seeks a recovery in this action were made to purchasers for use or consumption other than in the course of trade or business. (Stip. VI, R. 145.)

Neither respondent, the United States, any department or agency thereof, Lend-Lease or any foreign government purchased any of the gloves in respect of which respondent seeks a recovery. (Stip. VII, R. 145.)

Between March 4, 1943, and March 18, 1943, petitioner made no sales or deliveries of any gloves whatsoever. (Finding No. 8, R. 179, 180; Stip. XIII, R. 146.)

From March 18 to August 28, 1943, petitioner sold and

delivered its gloves in reliance on the March 18, 1943, letter from O.P.A. (Findings 9 & 10, R. 180, 181.)

From August 28, 1943, to the date of the commencement of this action below, petitioner made no sales of any models of its gloves at a price which, under the contentions of the O.P.A., would not be the correct ceiling price. (Finding No. 10, R. 180, 181.)

IV.

QUESTIONS PRESENTED.

Upon the record and the opinion of the Circuit Court of Appeals, the following important questions are presented:

1. Whether the Circuit Court of Appeals erred in holding that the decision of this Court in *Bowles, Adm. v. Seminole Rock and Sand Co.* (89 L. Ed. Adv. Op. 1186) conclusively established the rule of law against petitioner's contention as to its maximum prices for work gloves. (R. 197.) In the instant case the General Maximum Price Regulation and Amendments 23 and 38 thereof are involved. In the Seminole case only Maximum Price Regulation 188 was involved. (89 L. Ed. Adv. Op. 1187; footnote 9, p. 1190.) The language of the two regulations is not the same. The pertinent facts are materially different in the two cases.

2. Whether the Circuit Court of Appeals erred in holding that the good faith provision of Section 205(d) of the Emergency Price Control Act of 1942, as amended (50 USCA App. 925(d)), was unavailable to petitioner as a defense (R. 198) even though petitioner's good faith was stipulated (Stip. XIV, R. 147) and even though the trial court

found as a fact, based on uncontradicted evidence, that petitioner acted in good faith and in the belief that its sales and deliveries of work gloves were made "in pursuance of applicable regulations of the Office of Price Administration." (Finding No. 12, R. 181; R. 99.)

3. Whether the Circuit Court of Appeals erred in holding that a letter to petitioner from the Indianapolis office of O.P.A., written with the knowledge and approval of the Cleveland Regional Office and, petitioner believes, the Washington office of O.P.A., advising petitioner, after it had previously ceased deliveries of its work gloves "to proceed with shipments on the basis of your March 21, 1942, list prices," did not estop respondent from claiming a penalty for at least the period petitioner relied upon the permissions contained in the letter. (R. 200.)

4. Whether the petitioner has been denied due process of law, as guaranteed by the Fifth Amendment to the Constitution of the United States, in not being afforded an adequate opportunity to contest the validity of the regulation as construed by respondent. (R. 200.)

V.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has misapplied the ruling of this Court in the case of *Bowles v. Seminole Rock and Sand Co.* (89 L. Ed. Adv. Op. 1186) in deciding a question of substance in the instant case, where the facts are materially different and where a different regulation and amendments thereto are involved, thus deciding a question

of federal law, viz: the construction of the General Maximum Price Regulation and Amendments 23 and 38 thereto, which has not been, but should be, settled by this Court.

2. The scope and meaning of Section 205(d) (50 USCA 925(d)), the good faith provision of the Emergency Price Control Act of 1942, as amended (50 USCA 901-943, 56 Stat. 23, 767; 58 Stat. 632), which is an important question of federal law decided by the Circuit Court of Appeals, and which has not been, but should be, decided by this Court.

3. The acts of the representatives of respondent in inducing petitioner by letter to resume deliveries of its work gloves at March 21, 1942, prices should be held to work an equitable estoppel against respondent and preclude a taking of petitioner's property, since respondent is authorized to make representations (50 USCA 902(a)), did make them, and petitioner has relied on them to its harm.

4. Petitioner has been denied due process of law, as guaranteed by the Fifth Amendment to the Constitution of the United States (which this Court will correct (*Yakus v. United States*, 321 U. S. 432, 434)), in this:

(a) Except for a letter dated March 2, 1943, by which petitioner was advised that in the opinion of the Indianapolis office of O.P.A. the prices which it then was charging and receiving for certain of its work gloves were in excess of the maximum prices established pursuant to the Act as amended (Stip. XI, R. 146), petitioner was not notified by O.P.A. until receipt of the letter dated August 28, 1943 (Stip. Ex. C, R. 163-170) of the construction respondent placed on the regulation as to the maximum prices to be charged for certain models of its work gloves. Nor did petitioner know until the August 28, 1943, letter that respondent's construc-

tion was that certain style numbers of its gloves even though some differed only in color were not to be considered the same commodity in applying the pricing provisions of the regulation.

(b) In less than 60 days, the then statutory time within which to file a protest, after receipt by petitioner of the August 28th letter, and on October 6, 1943, this suit was commenced.

(c) Petitioner did not have an opportunity initially to contest the validity of the regulation within the then 60 days' statutory limit because petitioner did not know until much more than 60 days after May 11, 1942, the effective date of the regulation, that the respondent construed the regulation differently than petitioner had.

(d) Petitioner has not had an adequate opportunity to contest respondent's construction of the General Maximum Price Regulation, as amended, as applied to it and as given in the letter of August 28, 1943, prior to the commencement of this action by respondent on October 6, 1943.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 8692, Chester Bowles, Administrator, Office of Price Administration vs. Indianapolis Glove Company, and that the decree of said Circuit Court of Appeals in said cause be reversed by this

Court, and that petitioner have such other and further relief in the premises as to this Court may seem just.

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CHESTER BOWLES, *Administrator,*
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No. ———

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The District Court neither gave nor filed a written opinion, but found the facts specially (R. 137-182) and stated thereon its conclusion of law in petitioner's favor. (R. 182.)

The opinion of the Circuit Court of Appeals for the Seventh Circuit, filed August 3, 1945, appears at pages 194 to 202 of the record and is reported in 150 Fed. 2nd 597. No opinion was filed denying petitioner's petition for rehearing. (R. 223.)

II.

JURISDICTION.

A statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction is set out in the foregoing petition at page 3.

III.

STATEMENT OF THE CASE.

A full statement of the facts having been made in the foregoing petition (pp. 3 to 10), for brevity is not here repeated.

IV.

ASSIGNMENTS OF ERROR.

The Circuit Court of Appeals erred in the following particulars in holding that:

1. The decision of this Court in *Bowles, Adm. v. Seminole Rock and Sand Co.,* [4] decided on different facts and a different regulation of O.P.A., conclusively established the rule of law against petitioner's contentions as to what were its maximum prices for work gloves;

2. The good faith provision of Section 205(d) of the Act [5] was unavailable to petitioner as a defense when such good faith was stipulated [6] and the trial court found on uncontradicted evidence that petitioner acted in good faith and that its sales and deliveries were made "in pursuance

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(4) Decided June 4, 1945, 89 L. Ed. Adv. Op. 1186.
(5) Emergency Price Control Act of 1942, as amended (50 USCA 925 (d).
(6) Stip. XIV, R. 147.

of applicable regulations of the Office of Price Administration." [7]

3. A letter from the Indianapolis office of respondent, written with the approval of the Cleveland Regional Office, and petitioner believes the Washington office, advising petitioner to proceed with its deliveries at March 21, 1942, prices, did not estop respondent from claiming a penalty for at least the period of time the letter was outstanding.

4. Petitioner was not denied due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States, in not being afforded an adequate opportunity to protest the regulation and respondent's construction, and even though respondent commenced this suit prior to the expiration of the statutory time for filing a protest after respondent's present construction of the regulation became known.

V.

ARGUMENT

A.

Complete jurisdiction in the Supreme Court of the United States is shown by the record.

This was a civil case in the United States Circuit Court of Appeals for the Seventh Circuit, and the petitioner was the only party defendant. (R. 2, 183, 193) (28 USCA 347(a), Judicial Code Sec. 240(a), C. 426, 48 Stat. 926.)

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[7] Finding No. 12, R. 181; R. 99.

B.

1.

The Circuit Court of Appeals erred in at least four particulars.

The Circuit Court of Appeals held that the decision of this Court in *Bowles v. Seminole Rock and Sand Co.* (89 L. Ed. Adv. Op. 1186) conclusively established the rule of law against petitioner's contentions as to its maximum prices. Such distention of the rule was an incorrect application of the decision. The consideration of this Court in that case was "directed to the proper interpretation and application of certain provisions of Maximum Price Regulation No. 188" (89 L. Ed. Adv. Op. 1187). The instant case concerns itself with General Maximum Price Regulation, as amended, and Amendments 23 and 38, none of which was involved in the Seminole case.

The language of the two regulations differs in an important particular. Regulation 188 provides in part that

> " 'Highest price charged during March, 1942' means
> "(i) The highest price which the seller charged to a purchaser of the same class for delivery of *the article* or *material* during March, 1942; . . ." (Emphasis supplied) 7 Fed. Reg. 7968, 7969.

General Maximum Price Regulation, as amended, provides in part that

> "Highest price charged during March, 1942, shall be:
> "(a) The highest price which the seller charged for a *commodity* delivered or service supplied by him during March, 1942, to a purchaser of the same class . . ." (Emphasis supplied) (Stip. V, R. 143, 144).

The word "article" is more limited in meaning than is the word "commodity." As this Court said, "In common usage, 'article' is applied to almost every *separate* substance or material, whether *as a member* of a class, or as a *particular* substance or commodity." [8] (Emphasis supplied.)

The trial court found in the instant case that all of petitioner's gloves "are essentially the same commodity." (Finding No. 14, R. 181.) Thus, petitioner having sold many of its models of gloves at March 21, 1942, prices (Stip. Ex. F, R. 171; offered R. 24), it follows that under the wording of the applicable regulation, as amended, the prices of all of its models, they being the same commodity, could be fixed pursuant to the regulation by adding to or subtracting from the prices at which those models sold in March, 1942, the well-established differentials recognized to exist by O.P.A. (R. 87.) No such latitude was permissible under the wording of Regulation 188, and the question was not raised or passed on in the Seminole case.

General Maximum Price Regulation, as amended, carried a proviso clause (Sec. 1499.2) [9] which in substance provides that if the seller raised his prices prior to April 1, 1942, [10] for delivery of a commodity to his class of purchasers generally and if, during March, 1942, he delivered such commodity [11] at the higher price to at least one class

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[8] June vs. Hedden, 146 U. S. 233, 36 L. Ed. 953, 956.

[9] The full text of Section 1499.2, General Maximum Price Regulation, as amended, appears at pages 143 and 144 of the record. The proviso clause appears at page 144.

[10] Petitioner issued a new price list to its customers effective as of March 21, 1942. (Stip. XX, R. 149.)

[11] During March, 1942, petitioner delivered 58 different models of its work gloves at its March 21, 1942, prices.

of purchasers, [12] then the highest price charged during March, 1942, for each class of purchasers is fixed as follows:

(a) to those to whom no delivery was made during March at the higher price;

(b) to those to whom no delivery was made at a lower price except pursuant to prior commitment,

the highest price charged is the seller's highest offering price for delivery to such class of purchaser during March, 1942.

Regulation 188 provides in Sec. 1499.151 that

> "The provisions of Section 1499.1 to 1499.3, inclusive, and Section 1499.18 of General Maximum Price Regulation shall not apply to sales or deliveries by manufacturers of certain consumers goods set forth in Section 1499.166, Appendix A, of this Maximum Price Regulation 188."

Section 1499.2 of General Maximum Price Regulation carries the proviso clause, thus the proviso clause was inapplicable under Regulation 188.

Amendments 23 and 38 became effective on August 26, 1942, and December 10, 1942, respectively. Each amended Section 1499.2 of General Maximum Price Regulation which contained the proviso clause respecting the seller's highest price charged during March, 1942, if before April 1, 1942, the seller raised his prices for a commodity (Stip. III, R. 138; Stip. V, R. 143).

The proviso clause shows that where a seller had in-

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(12) Petitioner has one price to all its purchasers for all orders for the same item, with the exception of incidental sales in broken lots. (Stip. XXVI, R. 150.)

creased his prices before April 1, 1942, as petitioner did (Stip. XX, R. 149), and where the seller made deliveries, at lower prices than those fixed before April 1, 1942, only pursuant to prior commitment entered into before the price rise, as petitioner did (Stip. XXIII, R. 150; Stip. XXI, R. 149), then the seller's highest price charged during March, 1942, is the seller's highest offering price for delivery or supply during March, 1942. Thus petitioner's highest prices charged during March, 1942, were those prices appearing on the basic price list of March 21, 1942.

The proviso clause was inapplicable to Regulation 188 which was the only regulation before the court in the Seminole case. Furthermore there were no deliveries of the article by Seminole during March, 1942, at the higher price.

In view of the fact, as found by the trial court (Finding 14, R. 181), that each item, number and style of petitioner's gloves is not a separate commodity, but are essentially the same commodity, the delivery of at least 58 models in March, 1942, at March 21, 1942, prices, fixed the highest price charged for those gloves at the March 21, 1942, prices. And by applying the well-established differentials in price based on weight, style and size (a practice of the industry for more than 25 years) to the prices charged for essentially the same commodity, which was delivered in March, 1942, all of petitioner's prices were thus fixed. No such situation existed in the Seminole case.

The application of the well-established price differentials is clearly permitted under the provisions of the Act, and the Administrator is conclusively precluded in the exercise of the powers granted under the Act from compelling any change in business practices, except upon an affirmative

finding requiring such change. Section 2(h) of the Act (50 USCA App. 902(h)) provides that:

> "The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, or changes in established rental practices, except where such action is affirmatively found by the Administrator to be necessary to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act."

This record does not disclose that there has been any affirmative finding by the Administrator requiring a change in the established business practices of petitioner, and nothing is known about such affirmative action ever having been taken.

The whole purpose of the Emergency Price Control Act, as amended, was to stabilize prices. General Maximum Price Regulation was designed to fix those prices at March, 1942, levels. Under the construction given by respondent to the General Maximum Price Regulation, as amended, and the applicable statutes in the instant case, the prices at which the petitioner's commodity can be sold were driven down to December, 1941, prices, or lower, irrespective of the fact that petitioner had clearly established higher prices by sales in March, 1942. To have required and to now require petitioner to sell its commodity at the December, 1941, prices, or lower, takes from petitioner its rights under the proviso clause and prohibits the use of its highest offering price during March, 1942.

2.

The Circuit Court of Appeals erred in holding that good

faith is not a defense to respondent's action against petitioner.

It was stipulated by the parties that the respondent did not claim a willful violation by petitioner; and that respondent did not dispute petitioner's contention that what it did in the sale of its gloves it did in the belief that "it had the right to do so *under the applicable regulations.*" (Emphasis supplied.) (Finding No. XIV, R. 147.)

The Court further found as a fact "That defendant (petitioner) in the sale and delivery of its gloves at all times referred to in plaintiff's (respondent's) complaint acted in good faith and in the belief that its sales and deliveries of work gloves were made *in pursuance of applicable regulations of the Office of Price Administration.*" (Emphasis supplied.) (Finding No. 12, R. 181.)

Section 205(d) of the Act (50 USCA App. 925(d); C. 325, Title I, Sec. 108, 58 Stat. 640) provides in part that:

> "No person shall be held liable for damages for penalties in any Federal . . . court, on any grounds for or in respect of any thing done or omitted to be done *in good faith pursuant to* any provision of this Act or *any regulation,* order price schedule, requirement or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration . . . notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid . . . " (Emphasis supplied.)

The trial court has found that petitioner acted *in good faith in pursuance of applicable regulations* of O.P.A. The parties stipulated the good faith of petitioner *under the*

regulations. Petitioner is thus within the protection of Section 205(d) of the Act.

The applicability of the good faith provision to facts such as are in this record, has not been, but should be, decided by this Court. The scope of the good faith provision is of public importance, and the public interest will be promoted by settlement in this Court of the question.

3.

The Circuit Court of Appeals erred in holding that the letter received by petitioner from the Indianapolis Office of Price Administration on March 18, 1943, did not constitute an estoppel.

The letter, among other things, after reciting petitioner's contentions, said:

> "We see no alternative other than to advise you to proceed with shipments on the basis of your March 21, 1942, list prices pending a definite ruling and decision by the Cleveland and Washington offices. It is understood that this does not legalize or validate the prices charged *from May* 11, 1942, the date the General Maximum Price Regulation became effective, *up to the present time.*" (Emphasis supplied) (R. 180).

Prior to the time the letter was written, the Attorney for O.P.A. telephoned the Cleveland office and reported to petitioner's Messrs. Elsey and Clayton that

> "he had presented our views of the matter to the Cleveland office and discussed them with them and they would have a man to go to Washington and take the matter up with the office in Washington, that it was something for them to decide." (R. 97.)

It was not until subsequent to the telephone conversation with the Cleveland office and petitioner believes consultation with the Washington office, that the letter was written to petitioner. It was not until receipt of this letter that petitioner resumed shipments under its March 21, 1942, basic price list. (R. 98.)

The August 28, 1943, letter appears to support the belief that Washington knew of the March 18, 1943, letter. The August letter says in part that "A *further* ruling and determination has now been made by the Washington office." (Emphasis supplied.) (R. 164, para. 6.)

The respondent did not call as witnesses any persons from the Cleveland or Washington offices in respect to the conversations relative to the letter. Nor did respondent call S. A. Robinson, chief price attorney for the Indianapolis office, who conferred with Messrs. Elsey and Clayton and who telephoned the Cleveland office of O.P.A. respecting petitioner's price. There is no showing in the record that respondent did not have it within his power to call such persons. The failure of the respondent to call any witnesses from the Cleveland or Washington offices, having it within his power to do so, is an admission that both approved the letter.

In re Kellog, 113 Fed. 120, 130;

Godwin v. DeMotte, 64 Ind. App. 394, 116 N. E. 17.

Order and certainty, one of the first objectives of good government, cannot be secured if the government itself is not to be depended upon to abide its grants.

United States v. U. S. Gypsum Co., 53 F. Supp. 889, 890.

It certainly was not the intention of Congress in enacting the Emergency Price Control Act to permit the Administrator or his agents, after having once acted upon facts fully before them and exercised their best judgment, to change that judgment to the detriment of a person relying thereon as is the situation in the instant case.

Woodworth v. Kales, 26 F. (2d) 178 (CCA 6 1928).

This too is a question of public importance. As the public deals more and more, as it must, with the swelling throng of federal agencies, there should be set at rest the question of whether the Federal Government, when it becomes an actor in a court of justice, should not be bound by those fixed principles which govern between man and man in like situation.

4.

The Circuit Court of Appeals erred in holding that petitioner was not denied due process of law in not being afforded an adequate opportunity to contest the validity of the regulation as construed by respondent. The Court held, in part, that "Section 203 of the Emergency Price Control Act, 50 U.S.C.A. App. Sec. 923, as amended June 30, 1944, provides for the procedure for filing protests against any regulation, order or price schedule *at any time* after issuance or effective date thereof and for disposition of such protests by the Administrator." (R. 200.)

This statement is predicated on the amendment of Section 923 of Title 50 U.S.C.A. App. by the Stabilization Extension Act of 1944, effective June 30, 1944. Prior to the amendment on June 30, 1944, the statute limited the time within which a protest might be filed to a period of 60 days

after the issuance of any regulation or order or within 60 days after the effective date of any price schedule.

Neither petitioner nor respondent knew precisely what respondent's construction of the General Maximum Price Regulation involved here was until August 28, 1943. (Stip. Ex. C, R. 163.) The General Maximum Price Regulation was effective on May 11, 1942. Thus, under the statute as it existed at that time, petitioner was precluded from raising the question of the validity of the regulation after July 10, 1942, which was the expiration of the 60-day period. The complaint seeks to recover for sales at allegedly over-ceiling prices made between October 6, 1942, and October 6, 1943. Since the 60-day limitation was not removed from Section 923 of the statute until June 30, 1944, petitioner's opportunity of protesting the regulation was not enlarged beyond the 60-day period until after the sales in controversy here had been made. To have protested the regulation after the removal in 1944 of the 60-day limitation would have been of doubtful aid to petitioner in respect of sales made between October 6, 1942, and October 6, 1943.

Furthermore, petitioner was not notified by respondent until receipt of the letter dated August 28, 1943 (Stip. Ex. C, R. 163-170) of the construction respondent placed on the regulation as to maximum prices to be charged for certain models of its gloves. Nor did petitioner know until receipt of the August 28, 1943, letter that respondent's construction was that certain style numbers of its gloves were not to be considered the same commodity in applying the pricing provisions of the regulation.

Petitioner did receive a letter dated March 2, 1943, signed by the price attorney of the Indianapolis office of respondent claiming that petitioner's prices were in ex-

cess of maximum prices (Stip. VI, R. 146). But this letter was superseded by a letter dated March 18, 1943, from the same office of respondent, which instructed petitioner to proceed to deliver its commodity on the basis of its March 21, 1943, prices. (Finding No. 8, R. 179, 180.)

Within less than 60 days of the date of the August 28, 1943, letter, giving petitioner respondent's construction of the regulation as applied to petitioner, and on October 6, 1943, this suit was commenced by respondent. In other words, from the date of the letter to the date of the commencement of this suit by respondent only 40 days elapsed.

On August 28, 1943, Section 203 of the Act (50 USCA App. 923(a)) allowed 60 days within which any person subject to any regulation, order, price, schedule, requirement or agreement could file a protest. Yet, despite this 60 provision, respondent commenced the instant suit within 40 days after the date of the letter.

Petitioner, by the haste of respondent, also has been denied due process of law, and the Circuit Court of Appeals has erred in refusing to grant petitioner relief. A denial of due process will be corrected by this Court (*Yakus v. United States*, 321 U. S. 414, 88 L. Ed. 834).

WHEREFORE, petitioner prays the writ be granted.

WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
RUSSELL J. RYAN, JR.,
Counsel for Petitioner.

Dated November 20, 1945.

INDEX

CITATIONS

678517—46

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 617

INDIANAPOLIS GLOVE COMPANY, A CORPORATION, PETITIONER

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The district court rendered no opinion. Its findings of fact and conclusions of law are set forth on page 192 of the Record. The opinion of the Circuit Court of Appeals (R. 194–202) is reported in 150 F. 2d 597.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 3, 1945 (R. 203). A petition for rehearing was filed on August 18, 1945

(R. 205) and was denied on August 28, 1945 (R. 223). The petition for a writ of certiorari was filed on November 20, 1945. Jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. Code 347 (a)).

QUESTIONS PRESENTED

1. Whether under the General Maximum Price Regulation as amended by amendments 23 and 38, the maximum price at which a manufacturer of work gloves may sell certain models of such gloves is the highest price at which it actually delivered such models in March 1942, or its offering price for such models in March 1942, where the only deliveries of such models were made under contract before March 1942.

2. Whether by virtue of the provisions of Section 205 (d) of the Act, the fact that the petitioner in violating a regulation issued under the Act acted in the good faith belief that it was complying with the regulation constitutes a defense to an action under Section 205 (e) of the Act.

3. Whether the Administrator is estopped from maintaining the action.

4. Whether petitioner was deprived of adequate opportunity to challenge the validity of the regulation and thus deprived of due process of law.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are the same as in *Good Luck Glove Co.* v. *Bowles,* No. 618.

STATEMENT

Alleging that the petitioner had violated the General Maximum Price Regulation by selling between October 6, 1942 and October 6, 1943 various models of gloves at prices in excess of those at which petitioner actually delivered the same models in March 1942, the Administrator brought this action to recover statutory damages under the provisions of Section 205 (e) of the Act.

There is no dispute as to the facts. Petitioner is a manufacturer of work gloves making over 500 different models. On March 21, 1942 it published a new price list, fixing prices as to all items higher than the prices it had previously charged (R. 145, 149). Approximately 300 styles of gloves were delivered during March 1942 only at prices lower than those quoted in the March 1942 price list (R. 150, 172). All such deliveries were made under contracts antedating March 1942. After the effective date of the General Maximum Price Regulation petitioner sold the particular models at prices higher than those at which it had actually delivered them in March 1942, namely, the prices shown on its March 1942 price list. (R. 149). After March 21, 1942 peti-

tioner accepted no orders for gloves except at the prices established by the price list of that date or in accordance with trade differentials in the case of gloves not listed. (R. 149). The parties stipulated that on March 2, 1943, the Administrator notified petitioner that the prices which it was then charging and receiving for certain models of its work gloves were in excess of the maximum prices permitted by the General Maximum Price Regulation (R. 145); that this was the first notice petitioner had received that the Administrator claimed that it was violating the regulation; (R. 146) that petitioner immediately upon receipt of the notice ceased to deliver gloves and did not deliver any until after the receipt of a letter from the Indianapolis Office of the Office of Price Administration on March 18, 1943, containing the following paragraph (R. 146):

> We have sought but not yet obtained a clarification of your position from the Regional and National Offices. We have been advised, however, that information is being assembled by the National Office for use in preparation of a specific regulation establishing maximum prices for work gloves applicable to the entire industry. Believing that the present situation constitutes a serious impediment to the production of goods and materials essential to the prosecution of the war, we see no alternative other than to advise you to proceed with

> shipments on the basis of your March 21, 1942, list prices pending a definite ruling and decision by the Cleveland or Washington Offices. It is understood that this does not legalize or validate the prices charged from May 11, 1942, the date the General Maximum Price Regulation became effective up to the present time.

This letter was revoked on August 28, 1943 (R. 146, 163).

It was also stipulated that petitioner had not wilfully violated the regulation by its sale of gloves during the times referred to in the complaint; and what it did in the sale of its gloves, it did in the belief that it had the right to do under the applicable regulations. (R. 147.)

The district court granted judgment for the petitioner (R. 182). The Circuit Court of Appeals reversed the judgment and remanded the cause for further procedure on the authority of the decision of this court in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410.

The Circuit Court of Appeals held that the General Maximum Price Regulation established the maximum price at which a seller might sell a commodity at the maximum price at which he had actually delivered the same commodity in March 1942, irrespective of whether the delivery was made under a contract antedated March 1942; that the fact that the petitioner in violating the

regulation had acted in good faith, and in the belief that it was complying with the terms of the regulation was not a defense to an action brought under Section 205 (e); that the Administrator was not estopped from maintaining the action; and that petitioner had, and still has, an adequate opportunity to challenge the validity of the regulation.

ARGUMENT

The decision of the court below is clearly right. It is not in conflict with the decision of any other appellate court. Nor does it decide any important question of law which has not already been decided by this Court.

1. The principal question in this case is the same as in *Good Luck Glove Co.* v. *Bowles,* No. 618, and is treated at pp. 9–17 of the Government's brief in opposition in that case, to which the Court is respectfully referred.

The contention made on pages 21 and 22 of petitioner's brief that the regulation, if construed as the court below construed it, would compel a change in business practices contrary to the provisions of Section 2 (h) of the Act was made and rejected in *Wells Lamont Corporation* v. *Bowles,* 149 F. 2d 364 (E. C. A. 1945) in which this Court denied certiorari on October 8, 1945. (No. 181, this Term). It is clearly untenable.

2. The fact that petitioner in violating the regulation acted in good faith plainly does not constitute a defense under Section 205 (d)[1] of the Act. That section protects one who acts in good faith pursuant to a regulation issued under the Act, but obviously does not protect one who acts in contravention of such a regulation. *Bowles* v. *Franceschini,* 145 F. 2d 510 (C. C. A. 1st). As the Senate Committee on Banking and Currency said: "Section 205 (d) does not confer any immunity upon any person who violates any such provision, regulation, order, or requirement." (Sen. Rep. 931, 77th Cong. 2d Sess., p. 26.)

3. Petitioner's contention that the Administrator is estopped from maintaining this action is equally without merit. Assuming that the United States may in certain cases be estopped by the acts of its officers, it certainly cannot be estopped by acts committed beyond the scope of the au-

[1] The Section reads as follows:

"(d) No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid. * * *"

thority of the persons committing them. *United States* v. *San Francisco,* 310 U. S. 16; *Bowles* v. *Sisk,* 144 F. 2d 163 (C. C. A. 4th); *Wells Lamont Corporation* v. *Bowles,* 149 F. 2d 364 (E. C. A.) certiorari denied, October 8, 1945, No. 181 this Term). In this case the Administrator has issued a regulation (Revised Procedural Regulation No. 1, 7 F. R. 8961) prescribing the procedure whereby any person affected by a maximum price regulation might obtain an official interpretation thereof and designating the persons authorized to give such interpretations. The petitioner did not see fit to follow the prescribed procedure. Moreover, the letter on which petitioner relies as raising an estoppel is not, and does not purport to be, an interpretation of the regulation but merely a permission to violate it. Neither the writer of the letter nor anyone else had authority to give such a dispensation.

4. There is no merit to petitioner's contention that it has not had an adequate opportunity to contest the validity of the General Maximum Price Regulation. In amending and extending the Emergency Price Control Act by the Stabilization Extension Act of 1944, Congress repealed the sixty-day limitation for the filing of protests to maximum price or rent regulations. A protest to such a regulation may now be filed at any time. Further, by the same act Congress provided a sec-

ond method for determining the validity of a maximum price or rent regulation. Under Section 204 (e) of the Act (which was added by the Stabilization Extension Act of 1944) the court in which a proceeding to enforce such a regulation is pending may, after judgment, stay the proceedings so as to afford the defendant the opportunity to file a complaint in the Emergency Court of Appeals to test the validity of the regulation. The filing of a prior protest with the Administrator is unnecessary. If the Emergency Court of Appeals holds the regulation invalid then, the section provides, the enforcement proceedings must be dismissed. Petitioner, therefore, still has ample opportunity to test the validity of the regulation.

Moreover, if, as petitioner asserts, the regulation is ambiguous (which we deny) and petitioner first learned of the interpretation which the Administrator placed on it on March 2, 1943, then under the statute as originally enacted the sixty-day period within which defendant was entitled to file a protest to the regulation would not begin to run until March 2, 1943. *United States Gypsum Co.* v. *Brown,* 137 F. 2d 803 (E. C. A.), certiorari denied, 320 U. S. 799. Therefore, even under the statute as it read before being amended, defendant had ample opportunity to challenge the validity of the regulation.

CONCLUSION

The decision of the court below is plainly right and no reason exists which would warrant its being reviewed by this Court.

Respectfully submitted,

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JANUARY, 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946